



COMMONWEALTH of VIRGINIA

CHESAPEAKE BAY LOCAL ASSISTANCE DEPARTMENT

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September 19, 2002

Mr. Jody Hollingsworth
Director of Planning
500 City Hall Avenue
Poquoson, Virginia 23662-1996

Re: Lyon's Landing Preliminary Plan

Dear Mr. Hollingsworth:

Per your request, I have reviewed the preliminary subdivision plan for Lyons Landing dated August 26, 2002. The plan depicts a proposed 15-lot residential subdivision along Lyon's Creek in the City of Poquoson. The plan also shows that the building envelopes of nine of the lots encroach into the Resource Protection Area (RPA). Section 11.4-6(n) of the City's Environmental Management Area Overlay District states:

"Lot size shall be subject to the requirements of the underlying zoning district(s) as defined in Articles IV-X.II of Appendix A of the Code of the City of Poquoson, Virginia, provided however, that any newly created lot shall have sufficient area outside the RPA within reach to accommodate the intended development in full accordance with performance standards in this section, when such intended development is not otherwise allowed in the RPA".

Based on the above regulatory language, the City should not grant approval for new lots that will require an exception from the Board of Zoning Appeals in order to develop. If the recordation of the Lyon's Landing subdivision were permitted as currently designed, the City itself would be creating a hardship for the future owners of the nine lots who would need to apply for exceptions in order to construct their residences. Any approval by the City for new lots requiring an exception to develop would be inconsistent with the City's Environmental Management Area Overlay District and the Chesapeake Bay Preservation Area Designation and Management Regulations.

The applicants of the Lyon's Landing project are still within their rights to request a formal exception from the City's Board of Zoning Appeals in order to proceed with the subdivision. In reviewing the application for exception, the Board must consider the five criteria set forth under Section 11.4-13(f)(2) of the Poquoson zoning ordinance. The first criteria listed under the aforementioned section states that:

"the exception request shall not be based upon conditions or circumstances that are self-created or self-imposed. The exception must pertain to alleviating requirements imposed by the implementation of the ordinance and shall not afford a special privilege or mere convenience sought by the applicant".

In this case, the applicants have imposed this hardship on themselves by proposing to create new residential lots that do not meet the requirements of the city's Environmental Management Area Overlay District because of inadequate buildable area outside the RPA. Because the application would not satisfy the first criteria, the Board should not approve the exception request.

In general, exceptions related to requests for uses and development within RPAs should only be considered by the Board in those situations where the property owner can show that the property was acquired in good faith and where, by reasons of the exceptional narrowness, shallowness, size or shape of the property, or where by reasons of exceptional topographic conditions or other extraordinary conditions associated with the owner's property or of immediately adjacent properties, the strict application of the City's regulations would prohibit or unreasonably restrict the use of the property. It is the opinion of the Department that neither the shape, size, nor topographic conditions of the property restrict, in any way, the reasonable use of the property under the requirements of the City's zoning ordinance.

In our previous telephone discussions, you indicated that the applicant implied that there would be a financial hardship involved if the Lyon's Landing preliminary plan was not approved as currently designed. While it is true that the denial of the exception request may reduce the number of lots that the applicants could create on this property, it should be noted that it is a well-settled matter of law in Virginia that financial hardship (i.e., wanting to maximize the number of lots in a development; the design or engineering costs associated with compliance, etc.), by itself, is **not** sufficient grounds upon which to grant an exception. This has been decided in the Virginia cases *Azalea Corp. v. City of Richmond*, 201 Va. 636, 112 S.E. 2d 862 (1960) and *Baum v. Lunsford*, 235 Va. 5, 365 S.E. 2d 739 (1988).

The Virginia courts have also consistently ruled that no "taking" occurs unless a regulation denies the landowner **all** economically viable use of their property. If the exception request were denied by the Board, the applicants would still retain all legal rights to develop the Lyon's Landing property under the existing city regulations. Further legal clarification is provided in the Virginia Supreme Court decision *Prince William County v. Omni Homes* 253 Va 59 481 S.E. 2d 460 (1997). In this case, the Justices stated that "the loss of the ability to develop or use the land as originally intended is not a categorical taking if another economic use for the land is available, even if the value of the use is less than the value attached to the owner's desired use".

While the applicants for the Lyon's Landing proposal case clearly desire a 15-lot subdivision for the project, there is certainly sufficient space outside the RPA to develop the property with fewer lots, thereby providing viable economic and reasonable use of the land.

Therefore, based on the review of the preliminary subdivision plan for Lyon's Landing and the subsequent discussion provided above, it is the opinion of the Department that the applicants do not qualify to receive relief from the Board under the provisions of Section 11.4-13(f) of the Poquoson zoning ordinance, due to the fact that the situation from which the applicants request relief has been self-created.

For your use, I have attached a copy of our guidance document on the exception process, which should provide you with additional information on the issues explained in this letter. If you have any immediate questions or concerns, please feel free to contact me at (800) 243-7229

Sincerely,



Douglas G. Wetmore
Principal Environmental Planner

Cc: Martha Little, *CBLAD*
Shawn Smith, *CBLAD*

Enclosure